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BELLSOUTH

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September 7, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.
Docket No. 2005-82-C

Dear Mr. Terreni:

Enclosed for filing are an original and twenty five copies of the prefiled Direct Testimony of BellSouth Telecommunications, Inc.'s witness Ms. Michael Willis in the above-referenced matter.

Also enclosed for filing are an original and ten copies of BellSouth's Motion for Summary Disposition. This Motion is supported by Ms. Willis' prefiled Direct Testimony and the exhibits thereto.

As explained more fully in the enclosed Motion, NuVox and BellSouth negotiated and voluntarily entered into the Agreement under which they are operating, and this Commission approved the Agreement. The negotiated Agreement allows NuVox to convert its special access circuits (to which tariffed prices apply) to combinations of unbundled network elements ("UNEs") known as "EELs"[1] (to which much lower TELRIC prices apply), but only so long as NuVox uses those EELs to provide a "significant amount of local exchange service." The Agreement, therefore, requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs.

[1] "EEL" stands for "enhanced extended link." While not an unbundled network element itself, an EEL is comprised of an unbundled loop (including multiplexing/concentration equipment) and unbundled dedicated transport. *Net 2000 Communications, Inc. v. Verizon,* 17 FCC Rcd. 1150 at ¶3 (2001).

The Agreement does not require BellSouth to blindly accept NuVox's self-certification from that day forward. Instead, the Agreement allows BellSouth to audit any of NuVox's EELs. Under the language the parties negotiated, the only express qualifications of BellSouth's audit rights are that: (1) BellSouth provide NuVox 30 days' notice of the audit; (2) the audit is at BellSouth's sole expense; and (3) unless an audit finds non-compliance with specified matters, BellSouth may audit NuVox's records not more than once in any twelve month period.

NuVox has converted approximately 572 circuits in South Carolina from special access to EELs. BellSouth has sought to audit NuVox's EELs in strict accordance with the language of the Agreement, but NuVox has refused the audit. Despite the clarity of its contractual obligation, NuVox has blocked the audit because BellSouth has not *first*: (1) "demonstrated a concern" regarding circuit non-compliance with the self-certification NuVox provided in order to qualify for the conversions under the Agreement; (2) linked its "concern" or "concerns" to each and every converted circuit to be audited; (3) confirmed that it seeks to audit only those circuits for which such linkage is demonstrated; and (4) hired a suitably "independent auditor" to conduct the audit "in accordance with AICPA[2] standards." No such pre-conditions to an audit appear in the Agreement's EELs audit provisions, or anywhere else in the Agreement the parties negotiated. But, this has not stopped NuVox from blocking the audit anyway.

To support its refusal to allow BellSouth to conduct an audit, NuVox relies on certain provisions of the Federal Communications Commission's ("FCC's") *Supplemental Order Clarification*, which NuVox claims are incorporated by reference into the Agreement by virtue of a generic "compliance with all laws" clause found in the General Terms & Conditions section of the Agreement. NuVox's reliance on these provisions of the *Supplemental Order Clarification* suffers from the following fatal flaws:

1. The *Supplemental Order Clarification* upon which NuVox relies was released before NuVox and BellSouth negotiated and voluntarily entered into "a binding agreement . . . without regard to the standards set forth in subsections (b) and (c) of section 251 of [the federal Act]."[3] As a matter of law, therefore, the plain language of the Agreement – and not NuVox's erroneous and conflicting interpretation of provisions of a pre-existing FCC Order – govern the parties respective audit rights.

2. The Agreement the Parties negotiated and voluntarily entered into contains a merger clause. That merger clause provides that neither Party is bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in the Agreement. In the Agreement, the Parties "expressly stated" that the

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2 "AICPA" stands for American Institute for Certified Public Accountants.

3 *See* 47 U.S.C. §252(a)(1).

provisions of two specific paragraphs of the *Supplemental Order Clarification* were incorporated by reference into the agreement. Pursuant to the unambiguous language of the Agreement, therefore, those specific paragraphs – and only those specific paragraphs – of the *Supplemental Order Clarification* apply to the Agreement, and those paragraphs do not support NuVox's contentions.

3. Even if the *Supplemental Order Clarification* overrides the provisions of the Agreement that the Parties subsequently negotiated and voluntarily entered into (which it does not), NuVox's interpretation of the *Supplemental Order Clarification* is erroneous, and that *Order* does not impair BellSouth's contractual right to audit NuVox's EELs.

NuVox's refusal to honor its contractual audit commitments has now caused BellSouth to seek enforcement of its audit rights in five other states.[4] It is time for NuVox's South Carolina EELs to be audited as expressly agreed. In South Carolina, this will only happen upon order of this Commission which BellSouth, accordingly, seeks.

The facts set forth in BellSouth's Motion (which are supported by the Ms. Willis' prefiled Direct Testimony and the Exhibits thereto) cannot reasonably be disputed. Summary disposition of this matter is appropriate, therefore, because there is no genuine issue of material fact for the Commission to decide. BellSouth, therefore, requests that the Commission summarily enter an Order granting the relief BellSouth seeks in its Complaint.

By copy of this letter, I am serving all parties of record with a copy of Ms. Willis' prefiled Direct Testimony and of BellSouth's Motion as indicated on the attached Certificate of Service.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
DM5 #600837

[4] BellSouth has not sought to audit NuVox's EELs in the remaining three states in BellSouth's region because the number of NuVox EELs in those states currently is minimal.

BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

In Re:	)	
	)	
Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and NuVox Communications, Inc.	)	Docket No. 2005-82-C
	)	
	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'s MOTION FOR SUMMARY DISPOSITION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Motion for Summary Disposition of its Complaint to enforce the audit provisions in BellSouth's Interconnection Agreement ("Agreement") with NuVox Communications, Inc. ("NuVox"). Under the Agreement, BellSouth is entitled, upon 30 days' notice, to audit NuVox's records to verify the type of traffic being placed over combinations of loop and transport network elements. BellSouth gave NuVox the required notice of its intent to conduct such an audit and to seek appropriate relief as the audit results may dictate, in accordance with the Agreement. NuVox has breached the Agreement by refusing to permit the audit. As explained below, there are no genuine issues as to any material fact and BellSouth is entitled to judgment as a matter of law in these proceedings.[1]

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[1] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003)*. In fact, the Supreme Court of South Carolina recently held that "[w]here . . . the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues" without an evidentiary hearing. *See Unisys Corp. v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001)(addressing a motion to dismiss).

I. SUMMARY OF BELLSOUTH'S POSITION

NuVox and BellSouth negotiated and voluntarily entered into the Agreement under which they are operating, and this Commission approved the Agreement. The negotiated Agreement allows NuVox to convert its special access circuits (to which tariffed prices apply) to combinations of unbundled network elements ("UNEs") known as "EELs"[2] (to which much lower TELRIC prices apply), but only so long as NuVox uses those EELs to provide a "significant amount of local exchange service." The Agreement, therefore, requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs.

The Agreement does not require BellSouth to blindly accept NuVox's self-certification from that day forward. Instead, the Agreement allows BellSouth to audit any of NuVox's EELs. Under the language the parties negotiated, the only express qualifications of BellSouth's audit rights are that: (1) BellSouth provide NuVox 30 days' notice of the audit; (2) the audit is at BellSouth's sole expense; and (3) unless an audit finds non-compliance with specified matters, BellSouth may audit NuVox's records not more than once in any twelve month period.

NuVox has converted approximately 572 circuits in South Carolina from special access to EELs. BellSouth has sought to audit NuVox's EELs in strict accordance with the language of the Agreement, but NuVox has refused the audit. Despite the clarity of its contractual obligation, NuVox has blocked the audit because BellSouth has not *first*: (1) "demonstrated a concern" regarding circuit non-compliance with the self-certification NuVox provided in order to qualify for the conversions under the Agreement; (2) linked its "concern" or "concerns" to each and

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[2] "EEL" stands for "enhanced extended link." While not an unbundled network element itself, an EEL is comprised of an unbundled loop (including multiplexing/concentration equipment) and unbundled dedicated transport. *Net 2000 Communications, Inc. v. Verizon,* 17 FCC Rcd. 1150 at ¶3 (2001).

every converted circuit to be audited; (3) confirmed that it seeks to audit only those circuits for which such linkage is demonstrated; and (4) hired a suitably "independent auditor" to conduct the audit "in accordance with AICPA[3] standards." No such pre-conditions to an audit appear in the Agreement's EELs audit provisions, or anywhere else in the Agreement the parties negotiated. But, this has not stopped NuVox from blocking the audit anyway.

To support its refusal to allow BellSouth to conduct an audit, NuVox relies on certain provisions of the Federal Communications Commission's ("FCC's") *Supplemental Order Clarification*, which NuVox claims are incorporated by reference into the Agreement by virtue of a generic "compliance with all laws" clause found in the General Terms & Conditions section of the Agreement. NuVox's reliance on these provisions of the *Supplemental Order Clarification* suffers from the following fatal flaws:

1. The *Supplemental Order Clarification* upon which NuVox relies was released before NuVox and BellSouth negotiated and voluntarily entered into "a binding agreement . . . without regard to the standards set forth in subsections (b) and (c) of section 251 of [the federal Act]."[4] As a matter of law, therefore, the plain language of the Agreement – and not NuVox's erroneous and conflicting interpretation of provisions of a pre-existing FCC Order – govern the parties respective audit rights.

2. The Agreement the Parties negotiated and voluntarily entered into contains a merger clause. That merger clause provides that neither Party is bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in the Agreement. In the Agreement, the Parties "expressly stated" that the provisions of two specific paragraphs of the *Supplemental Order Clarification* were incorporated by reference into the agreement. Pursuant to the unambiguous language of the Agreement, therefore, those specific paragraphs – and only those specific paragraphs – of the *Supplemental Order Clarification* apply to the Agreement, and those paragraphs do not support NuVox's contentions.

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3 "AICPA" stands for American Institute for Certified Public Accountants.

4 *See* 47 U.S.C. §252(a)(1).

3. Even if the *Supplemental Order Clarification* overrides the provisions of the Agreement that the Parties subsequently negotiated and voluntarily entered into (which it does not), NuVox's interpretation of the *Supplemental Order Clarification* is erroneous, and that *Order* does not impair BellSouth's contractual right to audit NuVox's EELs.

NuVox's refusal to honor its contractual audit commitments has now caused BellSouth to seek enforcement of its audit rights in five other states.[5] It is time for NuVox's South Carolina EELs to be audited as expressly agreed. In South Carolina, this will only happen upon order of this Commission which BellSouth, accordingly, seeks.

II. FACTS

This section of BellSouth's Motion summarizes the facts related to: the FCC's issuance of its *Supplemental Order*; the FCC's issuance of its *Supplemental Order Clarification*; the audit language the parties negotiated in the Agreement; NuVox's conversion of special access circuits to EELs under the agreement; and NuVox's refusal of BellSouth's request to conduct an audit related to those EELs. These facts cannot be reasonably disputed.

A. The FCC's *Supplemental Order*

In 1999, the FCC issued an Order responding to the Supreme Court's January 1999 decision that overturned many aspects of the unbundling rules the FCC had previously promulgated.[6] In that Order, the FCC concluded that any requesting carrier was entitled to obtain existing combinations of loops and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at UNE prices.[7] In response to various

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[5] BellSouth has not sought to audit NuVox's EELs in the remaining three states in BellSouth's region because the number of NuVox EELs in those states currently is minimal.

[6] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 F.C.C. Rcd. 1724 at ¶1 (November 5, 1999).

[7] *Id.*, ¶486.

petitions, the FCC issued its *Supplemental Order* on November 24, 1999.[8] In the *Supplemental Order*, the FCC modified its prior conclusion "to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements of this Order."[9]

The FCC held that this constraint "does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer."[10] It further held that this constraint "therefore does not affect the ability of competitive LECs to use combinations of loops and transport (referred to as the enhanced extended link) to provide local exchange service."[11] The FCC further stated: "we will presume that the requesting carrier is providing significant local exchange service if the requesting carrier is providing all of the end user's local exchange service," and "[b]ecause we intend the constraint we identify in this order to be limited in duration, we do not find it to be necessary for incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service."[12]

B. The FCC's *Supplemental Order Clarification*

On June 2, 2000, the FCC issued its *Supplemental Order Clarification*,[13] which clarified certain issues from the *Supplemental Order* regarding the "ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*."[14] In the *Supplemental Order*

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8 Supplemental Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 1760 (November 24, 1999).

9 *Id.* at ¶4.

10 *Id.* at ¶5.

11 *Id.*

12 *Id.* at n. 9.

Clarification, the FCC balanced the CLECs' interests and the ILECs' interests. The FCC, for instance, allowed the CLECs to obtain EELs upon self-certification that a significant amount of local exchange service would be provided over the EEL combinations.[15]

The FCC balanced this right it granted the CLECs by granting the ILECs the right to audit the circuits after conversion to verify compliance with the "significant amount of local exchange service" requirement.[16] As noted above, in the original *Supplemental Order,* the FCC did "not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport elements was so limited in duration."[17] In the *Supplemental Order Clarification*, however, the FCC recognized that extending the temporary restraint created the necessity of audits, stating that "[i]n order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent necessary to determine a requesting carrier's compliance with the local usage options."[18] While the FCC observed that audits should not be "routine,"[19] it clearly recognized that audits would occur. Accordingly, it directed "requesting carriers [to] maintain appropriate records that they can rely upon to support their local usage certification."[20]

The FCC then made statements that are of particular significance to this proceeding. First, the FCC recognized that parties could agree to audit provisions that differ from the

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13 Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 9587 (June 2, 2000).

14 *Id.* at ¶ 1.

15 *Id.*

16 *Id.* at ¶ 1

17 *Supplemental Order Clarification* at ¶29.

18 *See Supplemental Order Clarification*, ¶ 29

19 *Id.* at n.86.

20 *Id.* at ¶ 32.

provisions of the *Supplemental Order Clarification*.[21] Second, the FCC did not override these contractual audit provisions. To the contrary, the FCC stated that "in many cases, . . . interconnection agreements already contain audit rights," and it unambiguously stated "[w]e do not believe that we should restrict parties from relying on these agreements."[22]

C. The Agreement.

Effective June 30, 2000 (after the release of the *Supplemental Order Clarification*), NuVox and BellSouth entered into the Agreement to govern their relationship in South Carolina and each of the remaining eight states in BellSouth's operating territory.[23] The Agreement was not the subject of any arbitration proceedings. Instead, NuVox and BellSouth negotiated and voluntarily entered into "a binding agreement . . . without regard to the standards set forth in subsections (b) and (c) of section 251 of [the federal Act]."[24] The Agreement was filed with this Commission on August 15, 2000 and was approved in accordance with section 252(e) of the federal Act.[25]

The Agreement allows NuVox to order EELs from BellSouth in South Carolina. Specifically, the Agreement provides:

> Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, BellSouth shall offer access to loop and transport combinations, also known as Enhanced Extended Link ("EEL") as defined in Section 10.3 below [which describes the various types of EELs combinations].[26]

The Agreement also allows NuVox to convert its special access circuits (to which tariffed prices apply) to EELs (to which much lower TELRIC prices apply), but only so long as NuVox uses

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21 *Id.*
22 *Id.*
23 Direct Testimony of Michael Willis at 12-13. *See also* 47 U.S.C. §252(a)(1).
24 *Id.*
25 Direct Testimony of Michael Willis at 13; Exhibit MEW-3.
26 *See* Exhibit MEW-4 (Agreement, Att. 2, § 10.2.1).

those EELs to provide a "'significant amount of local exchange service' (as described in Section 10.5.2 below), in addition to exchange access service, to a particular customer."[27]

To define the term "significant amount of local exchange service," the Agreement expressly references paragraph 22 of the FCC's *Supplemental Order Clarification*.[28] Specifically, the Agreement provides that "[t]he Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 [*Supplemental Order Clarification*]," which provides three scenarios under which a competitive local exchange carrier ("CLEC") may self-certify compliance with the "significant amount of local exchange service" requirement.[29] Thus, the Agreement requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs.[30]

While the agreement allows NuVox to self-certify its compliance with this requirement prior to ordering EELs, it does not require BellSouth to blindly accept NuVox's self-certification

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[27] Exhibit MEW-4 (Agreement, Att. 2, § 10.5.1).

[28] Exhibit MEW-4 (Agreement, Att. 2, § 10.5.2).

[29] Exhibit MEW-4 (Agreement, Att. 2, § 10.5.2) (citing *Supplemental Order Clarification* ¶ 22). As explained in detail below, this is significant because in a negotiated agreement like the one between NuVox and BellSouth, the parties can agree to provisions "without regard to the standards set forth in subsections (b) and (c) of section 251" of the federal Act. *See* 47 U.S.C. §252(a)(1). The terms of the *Supplemental Order Clarification*, therefore, were not automatically a part of the agreement, and the parties could have chosen any definition they desired. *See Supplemental Order Clarification* at ¶32 ("in many cases, . . . interconnection agreements already contain audit rights," and "[w]e do not believe that we should restrict parties from relying on these agreements."). In this case, the parties chose to use the definition set forth in the *Supplemental Order Clarification* and, because that definition was not automatically a part of the agreement, it was necessary for the parties to incorporate the specific definition to which they had agreed by expressly referencing that definition in the Agreement. Notably, none of the sections of the Agreement addressing EELs refer to any other provisions of the *Supplemental Order Clarification.*

[30] Exhibit MEW-4 (Agreement, Att. 2, § 10.5.2).

from that day forward. Instead, the Agreement allows BellSouth to audit any of NuVox's EELs.[31] Specifically, Section 10.5.4 of Attachment 2 to the Agreement states:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one [sic] in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [NuVox].[32]

Under this language the parties negotiated, the only express qualifications of BellSouth's audit rights are the requirements related to: (1) 30 days' notice; (2) the expense burden; and (3) the frequency of the audits.[33]

D. NuVox's EELs.

Pursuant to the Agreement's conversion provisions, NuVox converted approximately 572 special access circuits to EELs in South Carolina, starting in 2000.[34] NuVox self-certified that these facilities were being used to provide a "significant amount of local exchange service."[35] In support of its self-certification, NuVox stated that it was the "exclusive provider of local

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31 Exhibit MEW-4 (Agreement, Att. 2, § 10.5.4).
32 *Id.*
33 *Id.*
34 Direct Testimony of Michael Willis at 16.
35 *Id.* at 17.

exchange service" for its South Carolina customers.[36] At no time did BellSouth demand or request an audit of any NuVox circuits prior to provisioning the conversions.[37]

E. BellSouth's Audit Requests and NuVox's Refusal.

On March 15, 2002, in accordance with the terms of the Agreement, BellSouth sent NuVox a letter providing 30 days' notice of BellSouth's intent to audit NuVox's EELs.[38] BellSouth advised in the letter that the purpose of the audit was to "verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC *Supplemental Order*."[39] BellSouth informed NuVox that it had selected an independent auditor to conduct the audit, and that BellSouth would incur the costs of the audit.[40] BellSouth forwarded a copy of the audit request letter to the FCC.[41]

NuVox refused to permit the audit.[42] Since the March 15, 2002 audit notice, the parties have exchanged correspondence and verbal communications -- BellSouth seeking to audit the EELs, and NuVox refusing to permit the audit as sought.[43] NuVox has refused on two principal grounds: (1) BellSouth must "demonstrate a concern" that warrants the audit and must audit only those circuits with which such concerns are linked; and (2) BellSouth's auditor (as identified in the March 15, 2002 Letter), is not "independent."[44] BellSouth has disagreed entirely with

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[36] *Id.* This particular option is one of the three potential options for NuVox to self-certify compliance with the "significant amount of local exchange service" requirement. Exhibit MEW-4 (Agreement, Att. 2, § 10.5.2) (citing *Supplemental Order Clarification* ¶ 22).

[37] Direct Testimony of Michael Willis at 17.

[38] Exhibit MEW-5 (*Letter from Jerry Hendrix to Hamilton Russell, III*, March 15, 2002).

[39] *Id.*

[40] *Id.*

[41] *Id. See also* Direct Testimony of Michael Willis at 18.

[42] Direct Testimony of Michael Willis at 19.

[43] *Id.*

[44] *See Id.*

NuVox's positions, and has repeatedly stated that the Agreement does not permit NuVox to block or delay the audit on any of NuVox's stated grounds.[45]

III. ARGUMENT[46]

A. BellSouth is Entitled to Audit NuVox's EELs Under the Agreement.

For years, BellSouth has honored its contractual commitment to allow NuVox to convert special access circuits to EELs based on NuVox's self-certifications that it is complying with the "significant amount of local exchange service" requirements in the Agreement.[47] The Agreement, however, does not require BellSouth to blindly accept those certifications from that day forward. Instead, the Agreement clearly allows BellSouth – at its own expense – to audit NuVox's records. The language that NuVox negotiated and voluntarily agreed to plainly states that BellSouth may conduct an audit "in order to verify the type of traffic being transmitted over combinations of loop and transport network elements."[48]

NuVox, however, will not voluntarily honor its contractual commitment. Instead, NuVox argues that BellSouth must comply with NuVox's erroneous interpretation of the requirements of the *Supplemental Order Clarification* prior to conducting an audit.[49] The Agreement, however, contains no such requirements, and the FCC has made it clear that the *Supplemental Order*

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45 *Id.* at 19-20.

46 The parties have agreed that the "Agreement shall be governed by, and construed and enforced in accordance with, the laws of state of Georgia." Exhibit MEW-4 (Agreement, General Terms and Conditions, Part A, ¶23). BellSouth, therefore, will cite to Georgia law in this Motion. BellSouth, however, also will cite to South Carolina law in order to demonstrate that Georgia law that is relevant to the issues in this proceeding is consistent with South Carolina law that is relevant to those issues.

47 *See* Direct Testimony of Michael Willis at 16-17.

48 Exhibit MEW-4 (Agreement, Att. 2, §10.5.4).

49 Answer at 1-3, ¶ 27.

Clarification does not restrict parties from relying on the audit rights that are set forth in their interconnection agreements.[50] NuVox's position, therefore, is utterly flawed.

BellSouth is asking this Commission to rule that pursuant to the Parties' Agreement, BellSouth is entitled to audit NuVox's EELs. BellSouth has met the audit clause's notice criteria. BellSouth will pay for the audit once it occurs. BellSouth has not conducted an audit of BellSouth's EELs in the past twelve-month period. Nothing more is needed to conclude that NuVox's refusal to allow BellSouth to conduct the audit is a clear and continuing breach of the Agreement.

1. In unambiguous language, NuVox has committed to allow BellSouth to audit NuVox's EELs as requested.

When the language of an agreement is unambiguous, that language must be accorded its plain meaning and the agreement must be enforced as written.[51] The Agreement's notice, expense, and frequency of audit requirements are unambiguous. Accordingly, they must be accorded their plain meaning and enforced as written.

Significantly, the Agreement does not contain any of the supposed requirements of the *Supplemental Order Clarification* that NuVox relies on. The Agreement, for instance, does not contemplate BellSouth's having to "demonstrate a concern" prior to conducting an audit. The Agreement plainly states:

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50 *Supplemental Order Clarification* ¶32.

51 *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 794 (Ga. 2001) ("[w]henever the language of a contract is plain, unambiguous and capable of only one reasonable interpretation, *no construction is required or even permissible*, and the contractual language used by the parties must be afforded its literal meaning") (emphasis added). This is consistent with South Carolina law on the subject. *See, e.g., Warner v. Weader,* 311 S.E.2d 78 (S.C. 1983) (providing that an unambiguous contract must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense); *Heins v. Heins,* 543 S.E.2d 224, 230 (S.C. Ct. App. 2001) ("The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully.").

> If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission . . . .[52]

Contrary to NuVox's assertions, the plain language of the Agreement shows that the purpose of the audit is to determine whether there is a concern in the first place. Nothing in the language NuVox negotiated and agreed to suggests otherwise.

Nor does the Agreement somehow incorporate any contrary language (to the extent that there is any) from the *Supplemental Order Clarification.* The only relevant reference to the *Supplemental Order Clarification* is the parties' agreement to "incorporate by reference paragraph 22" of that *Order* and their agreement that NuVox may self-certify "in the manner specified by paragraph 29" of that *Order.*[53] Neither paragraph 22 nor paragraph 29 of the *Order* contains language supporting NoVox's assertions. Thus, the unambiguous language of the Agreement provides BellSouth an unqualified right to audit NuVox's circuits provided BellSouth gives 30 days' notice, assumes the audit's expense, and complies with the frequency of audit requirements (all of which BellSouth has done). *Id.*

2. As permitted by federal law, the Parties negotiated and voluntarily entered into the Agreement "without regard to" the *Supplemental Order Clarification.*

The audit provision was voluntarily negotiated by BellSouth and NuVox pursuant to Section 252(a)(1) of the Act.[54] It is a fundamental principle under the Act that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b)

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52 Exhibit MEW-4 (Agreement, Att. 2, §10.5.4).
53 Exhibit MEW-4 (Agreement, Att. 2, § 10.5.4).
54 Direct Testimony of Michael Willis at 13.

and (c) of section 251."[55] This means that parties can bind themselves to the terms of their agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c).[56]

The ability of carriers to negotiate an interconnection agreement "without regard to subsections (b) and (c) of Section 251" extends to FCC rules and orders such as the *Supplemental Order Clarification*.[57] The FCC itself has acknowledged this fact, holding that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under Sections 251(b) and (c), including any pricing rules we adopt."[58] Moreover, as noted above, the FCC stated in the *Supplemental Order Clarification* itself that "in many cases, . . . interconnection agreements already contain audit rights" and "[w]e do not believe that we should restrict parties from relying on these agreements."[59] Because the Parties voluntarily negotiated the audit provision at issue, BellSouth's right to audit is governed solely by the Agreement. That the provisions of the Agreement (and not any allegedly additional or contrary provisions in the *Supplemental Order Clarification*) govern this dispute is clear from various

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[55] 47 U.S.C. § 252(a)(1).

[56] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 372 (1999) (recognizing that an "incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) ("[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)").

[57] *Iowa Utilities Board v. Commission*, 120 F.3d 753, n. 9 (8th Cir. 1997), aff'd in part, rev'd in part on other grounds, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("[t]he FCC's rules and regulations have direct effect only in the context of state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations").

[58] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 56 (1996).

[59] *Supplemental Order Clarification* ¶32.

court decisions which have refused to impose obligations under Sections 251(b) and (c) on parties to a voluntarily negotiated interconnection agreement.[60]

Clearly, the FCC issued its *Supplemental Order Clarification* in connection with the adoption of rules establishing the network elements that an ILEC must unbundle under Section 251(c).[61] However, as expressly permitted by Congress, NuVox and BellSouth voluntarily negotiated the terms and conditions governing the audit of EELs,[62] Because NuVox and BellSouth were negotiating a voluntary agreement, they were free to agree to terms that were different from the audit requirements in the *Supplemental Order Clarification*, and that is precisely what they did.[63]

In addition to being inconsistent with the text of the Act and with every authority on the issue, NuVox's position, if adopted, would undermine the Act's entire negotiation and arbitration scheme. To the extent NuVox was interested in having the *Supplemental Order Clarification* govern EELs audits, NuVox could have negotiated such language into the Agreement. Failing that, it could have sought arbitration on this issue.[64] Having elected not to avail itself of these

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[60] In *Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003), for instance, the Second Circuit held that "[o]nce the ILEC 'fulfills the duties' enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, it is then regulated directly by the interconnection agreement." The Court also held that a CLEC may not "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251." *Id.* Similarly, in *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 219 F.Supp. 2d 616, 633 (D.N.J. 2002), the federal district court stated that once a state commission grants approval, "the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)." The court further stated that a party to an interconnection agreement "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...." *Id.*

[61] *See Supplemental Order Clarification* ¶ 1.

[62] Direct Testimony of Michael Willis at 13. Exhibit MEW-4 (Agreement, Att. 2, §10.5.4).

[63] Exhibit MEW-4 (Agreement, Att. 2, § 10.5.4).

[64] *See generally* 47 U.S.C. § 252(b).

alternatives, NuVox cannot now ignore the unambiguous language of the contract it voluntarily negotiated, and it cannot now ask this Commission to rewrite the contract for it.[65]

3. The Agreement's "merger" clause is fatal to NuVox's position.

The Agreement contains an integration or "merger" clause that provides:

> This Agreement and its Attachments, incorporated herein by reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and *neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement* or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.[66]

This clause gives the Parties a substantive, contractual right against a tribunal's use of extraneous material to contradict the terms chosen in the contract.[67] Clearly, the *Supplemental Order Clarification* is "extraneous material." Thus, regardless of how NuVox might wish to characterize that order's requirements (and, as explained below, BellSouth disagrees with

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[65] *See Fernandes v. Manugistics Atlanta, Inc.* 582 S.E.2d 499, 503 (Ga. Ct. App. 2003) ("Neither the trial court nor this Court is at liberty to rewrite or revise a contract under the guise of construing it."). *Accord Hardee v. Hardee,* 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) ("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.")

[66] Exhibit MEW-4 (Agreement, General Terms & Conditions, § 45 (emphasis added).

[67] *GE Life and Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 2d 1348, 1357 (M.D. Ga. 2002) ("a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material"). *See also McBride v. Life Ins. Co. of Virginia*, 190 F.Supp.2d 1366, 1376 (M.D. Ga. 2002) ("As a matter of general contract construction, a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material."); *GE Life and Annuity Assurance Co. v. Combs*, 191 F.Supp.2d 1364, 1373 (M.D. Ga. 2002) (same). *Accord Wilson v. Landstrom*, 315 S.E.2d 130, 134 (S.C. Ct. App. 1983)("A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement. The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing.")

NuVox's characterization), the result here is the same: the merger clause bars the importation of any such requirements into the Agreement.

More specifically, the merger clause is fatal to NuVox's argument that all of the provisions of the *Supplemental Order Clarification* became provisions of the Agreement by virtue of the Agreement's "compliance with all applicable laws" provision.[68] NuVox and BellSouth were aware of the *Supplemental Order Clarification* and the definitions, provisions, and conditions set forth in that Order when they voluntarily entered into the Agreement. With that awareness, they agreed that "neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this

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[68] *See* Answer at 1-2, n.2. The Georgia Commission rejected this very argument on the identical issue in *In the Matter of BellSouth v. NewSouth,* Docket No. P-772 before the Georgia Public Service Commission, *Order* at 6-8, and for good reason. The Agreement requires the parties to "comply with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement." Exhibit MEW-4 (Agreement, General Terms & Conditions, § 35.1). However, this ubiquitous, generic clause, designed to allocate routine risks and costs of performing one's contractual obligations lawfully, is not relevant to this dispute. *See, e.g., Texaco v. FERC*, 148 F.3d 1091, 1096 (D.C.Cir. 1998) (D.C. Circuit, construing virtually identical "comply with all applicable laws" clause in pipeline contracts dispute, disregarded FERC's reliance on the clause in its administrative decision, stating that the clause is "merely a generic contract clause compelling both parties to adhere to the law" . . . [multiple citations omitted] and that "[i]ndeed, the structure of the . . . contracts confirms the banal nature of [the clause] and its irrelevance to rate setting.") Further, this generic provision cannot, as a basic matter of construction, override or alter the subsequently appearing, specific Agreement provision *that directly addresses EELs audits. In the Matter of BellSouth v. NewSouth, Order* at 7. *See Central Georgia Electric Membership Corp. v. Ga. Power Co.*, 121 S.E.2d 644, 646 (Ga. 1961) (whenever "apparent inconsistency [exists] between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and *pro tanto* nullification of the former"); V. Ferreira, Encyclopedia of Georgia Law, § 64 (1996 Rev.) (same). *See also Schwartz v. Harris Waste Management Group*, 516 S.E.2d 371, 375 (Ga.App. 1999) (". . . under general rules of contract construction, a limited or specific provision will prevail over one that is more broadly inclusive"). Thus, it was not necessary for the Parties to engage in an encyclopedic recitation of laws, orders, *etc.* that did not form a part of their understanding with respect to EELs audits; rather, the Parties could -- and did – accomplish this through the selection of precise audit terms, *i.e.*, Section 10.5.4.

Agreement . . . ."[69] With that awareness, they "expressly stated" that the provisions of paragraph 22 of the *Supplemental Order Clarification* were incorporated by reference into the agreement, and they expressly allowed for NuVox to self-certify "in the manner specified by paragraph 29" of the *Supplemental Order Clarification.*[70] Pursuant to the unambiguous language of the Agreement, therefore, paragraphs 22 and 29 – and only paragraphs 22 and 29 – of the *Supplemental Order Clarification* apply to the Agreement.[71]

Yet another rule of contract construction requires the Commission to reject NuVox's proposed interpretation of the Agreement. If NuVox's contention that the Agreement incorporates all of the provisions of the *Supplemental Order Clarification* were correct, there would have been no reason for the parties to "expressly state" that the provisions of paragraphs 22 of the *Order* are incorporated by reference into the Agreement or that NuVox may self-certify "in the manner specified by paragraph 29" of the *Supplemental Order Clarification.* NuVox's proposed interpretation of the Agreement, therefore, would render this provision of the Agreement superfluous and meaningless. As such, NuVox's proposed interpretation must be rejected as being contrary to controlling law.[72]

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[69] Exhibit MEW-4 (Agreement, General Terms & Conditions, § 45) (emphasis added).

[70] Exhibit MEW-4 (Agreement, Att. 2, § 10.5.2).

[71] As explained above, any ruling to the contrary would impermissibly render meaningless Congress' clear pronouncement that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with [a requesting CLEC] without regard to the standards set forth in subsections (b) and (c) of section 251" of the federal Act. *See* 47 U.S.C. §252(a)(1).

[72] *See Atlanta Development, Inc. v. Emerald Capital Investments,* 574 S.E.2d 585, 590 (Ga. App. 2002)(rejecting a proposed interpretation that would have rendered provisions of a contract superfluous, noting that "[t]he law favors a construction that will uphold the contract as a whole, and the entire contract should be read in arriving at the construction of any part."). *Cf. Pike v. South Carolina Dep't of Transportation,* 506 S.E.2d 516, 523 (S.C. Ct. App. 1998)("Case law, however, mandates that 'a statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.'").

B. The *Supplemental Order Clarification* Does Not Bar BellSouth's Audit of NuVox's EELs.

Even if the *Supplemental Order Clarification* were somehow relevant to this dispute (which it is not), BellSouth is still entitled to audit NuVox's EELs immediately. NuVox's "demonstration of concern" and auditor preconditions are not only alien to the parties' Agreement, but they also misinterpret what the FCC actually required in the *Supplemental Order Clarification*. As explained below, the *Supplemental Order Clarification* requires certain things related to audits, and it simply suggests other things regarding audits. As explained below, the *Supplemental Order Clarification* does not *require* an ILEC to demonstrate, or even state, a concern prior to conducting an audit. The following discussion, however, is academic, because neither the requirements nor the suggestions in the *Supplemental Order Clarification* apply when (as is the case in this proceeding) parties have agreed to audit provisions as expressly permitted by Congress.

In the absence of an agreement, the FCC imposed certain requirements regarding audits in the *Supplemental Order Clarification*. In Paragraph 31, for example, the FCC stated:

> We emphasize that incumbent LECs *may not require* a requesting carrier to submit to an audit *prior to provisioning* combinations of unbundled loop and transport network elements.[73]

"May not require" audits "prior to provisioning" is unambiguous and mandatory, representing a clear declaration by the FCC that any auditing of the circuits is not to occur until after they are first provisioned by the ILECs. In the same Paragraph, the FCC imposed requirements addressing the burden associated with ILEC audits:

> In order to reduce the burden on requesting carriers, *we find* that incumbent LECs *must provide* at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements *that it will*

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[73] *Supplemental Order Clarification*, ¶ 31 (emphases added).

> *conduct an audit*, and *may not* conduct more than one audit of the carrier in any calendar year *unless* an audit finds non-compliance.[74]

Here, again – and in the same paragraph upon which NuVox relies – the FCC states its intent with clarity, using mandatory language, and defining the obligations and limitations being imposed.

In sharp contrast, the provisions upon which NuVox relies do not contain mandatory language such as "must" and "may not." Instead, in a footnote to paragraph 31, the FCC states:

> The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. . . . We *agree* that this *should be* the only time that an incumbent LEC should request an audit.[75]

When considered in light of the text of Paragraph 31 quoted above, footnote 86 clearly is not a mandatory provision that grants substantive rights to NuVox.

The plain language of Paragraph 31 shows that the FCC *mandated* the following with respect to the mechanics of EELs audits (subject, of course, to the parties' statutory right to agree to different terms and conditions without regard to these mandates): (1) they may not precede, or be made preconditions to, the provisioning of EELs by the ILECs; (2) at least thirty days' notice is required before any audit is to commence; and (3) an ILEC may not perform more than one audit of any given CLEC per year, unless it finds non-compliance. In sharp contrast, the remaining statements in Paragraph 31 and in footnote 86 simply do not rise to the level of unequivocal declarations of legal obligations as do the enumerated requirements.

The FCC's *Supplemental Order Clarification*, therefore, establishes a symmetrical process aimed at speeding the provisioning process while providing compliance safeguards; just

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74 *Id.*, ¶ 31 (emphases added).

75 *Id.* n.86 (emphasis added).

as the ILEC is required to provision or convert the circuits upon request, the CLEC is required to allow an audit upon request. The FCC clearly did not provide requesting carriers the right to obstruct the audit process by challenging the legitimacy of the ILEC's concerns leading to the audit request, nor did the FCC even require the ILEC to share its concern with the CLEC. The FCC merely required the ILEC to provide notice to the FCC of audits, so that the FCC could monitor their use. The FCC did not in any way require or suggest that any pre-approval of the audit request was necessary – not by the FCC, let alone by the CLEC whose records were subject to audit.[76] And, most importantly to this proceeding, the FCC clearly did not override the plain audit language to which NuVox agreed in an Agreement that was negotiated "without regard to" the provisions of this *Order*.

C. NuVox's Purported Concerns Regarding the Mechanics of the Audit are Unfounded Red Herrings.

NuVox also questions BellSouth's power to choose an auditor and the standards by which the audit is to be conducted. Again, NuVox disregards the plain terms of the Agreement – and common business sense – in raising these unfounded concerns. NuVox insists that BellSouth must hire an independent auditor to conduct the audit in compliance with AICPA standards, and that BellSouth has failed, or will fail, to do so.[77] This argument is pure fiction. Section 10.5.4 of the Agreement gives NuVox no contractual say in BellSouth's choice of auditor. Indeed, BellSouth has the right to conduct the audit itself, if it chose to do so.

Moreover, NuVox's audit concerns are misplaced. BellSouth would not choose an auditor lacking the independence, experience or professionalism required to conduct a proper, thorough audit because it would make no sense to do so. A sham audit would reveal itself

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[76] Even if BellSouth were required to articulate a "concern" before initiating an audit, BellSouth has done so. Direct Testimony of Michael Willis at 21-27.

[77] *See* Answer at 3, 4, ¶ 18.

instantly, would harm BellSouth's legal interests, and would be of no value to BellSouth. Thus, any theoretical leverage that BellSouth might gain from a flawed audit would evaporate as soon as BellSouth attempted to enforce its rights based on such an audit's results.

As the Agreement makes clear, if any audit were to reveal non-compliance, BellSouth's remedy could only come through the filing of a "complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement."[78] In any such proceeding, the audit results would almost certainly be contested by NuVox, and would come under appropriate scrutiny before this Commission. Without question, an audit that lacked credibility would be exposed on the merits, and BellSouth would gain nothing. This fact alone negates the legitimacy of NuVox's concerns.

Moreover, the check-and-balance the parties negotiated in the Agreement was not an auditor selection prerequisite, and it was not a process through which NuVox could participate in that selection, veto it, or otherwise be involved in the decision. Rather, the parties chose to control the issue by disallowing self-help on the basis of the audit results alone, and instead requiring BellSouth to prove its case to "an appropriate Commission" before which such results could be carefully scrutinized. Thus, not only is NuVox's auditor selection argument entirely without contractual support, it rests on a demonstrably weak premise.

Finally, the auditor selected by BellSouth (American Consultants Alliance) is independent.[79] The firm is neither related to, nor affiliated with BellSouth in any way.[80] The

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78 Exhibit MEW-4 (Agreement, Att. 2, § 10.5.4).

79 Direct Testimony of Michael Willis at 27-28.

80 *Id.*

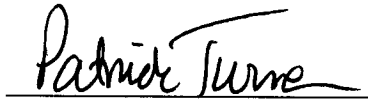
firm is not subject to the control or influence of BellSouth, nor is the firm dependent on BellSouth.[81] NuVox's concerns in this vein are also unfounded.

CONCLUSION

For the reasons set forth, BellSouth respectfully requests that the Commission issue an order: (1) finding that NuVox's refusal to allow BellSouth to audit its EEL combinations violates the Parties' Agreement; and (2) directing NuVox to do all things reasonably necessary to permit the independent auditor selected by BellSouth to commence the audit immediately.

Respectfully submitted this 7th day of September 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.



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81 *Id.*

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Motion for Summary Disposition in Docket No. 2005-82-C to be served upon the following this September 7, 2005:

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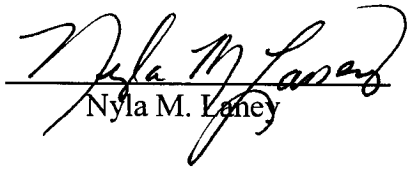

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